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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

Nos. 430 and 834
(Consolidated)

SAM ACHILLI, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF

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REPLY BRIEF

INTRODUCTION

Because the Government suddenly reversed itself with respect to the meaning and applicability of Section 3616(a) only one week before Petitioner's Brief was required to be filed—after adhering to a contrary position on this issue for almost five years[1]—the Briefs heretofore filed in the case necessarily could not deal with this sudden and belated change of view in its entirety. In order to insure that this turnabout is given adequate treatment, we are compelled in this Reply Brief to discuss last things first and first things last.

Accordingly, the format of this Brief will be first to lay the apparition of the inapplicability of Section 3616(a) to income tax; second, to examine some of the circumstances surrounding and consequences of the Government's change in attitude at this late hour in respect to the applicability of Section 3616(a) to income tax; and third, to reply to the Government's arguments that the overlap between Sections 3616(a) and 145(b) do not vitiate Petitioner's conviction or require that it be reduced to a misdemeanor.

I

A. The extraordinary characteristic of the Government's historical argument with respect to the inapplicability of Section 3616(a) to income tax is that it does not rest upon the history of Section 3616(a), but rather upon statutes entirely different from it.

[1] Though the Government began to prosecute income tax violations under Section 3616(a) for the first time in 1952, it was aware many years earlier that the Section applied to income tax. See *infra*, p. 15.

The derivation of Section 3616(a) was exactly and precisely defined by the Congress itself. In enacting the Internal Revenue Code of 1939, Congress expressly stated the ancestry of this provision. Section 3616(a), according to the Congress, was specifically derived from Section 3179 of the Revised Statutes, 53 Stat. App., xxxii, Table A, "Derivation of Internal Revenue Code"; and conversely, Section 3179 of the Revised Statutes was expressly noted, by the Congress, as being Section 3616(a) of the Internal Revenue Code of 1939. *Id.*, xL, Table B, "Statutes Included in the Internal Revenue Code".

In like fashion, the ancestry of Section 3179 of the Revised Statutes was plainly described by the Congress. That Section, according to the Congress, was derived directly from Section 15 of the Act of June 30, 1864, 13 Stat. 223, 227. Side note to Section 3179, Revised Statutes, 1874 Ed., 614, 1878 Ed., 611.

There is no further legislative history to Section 3616(a) or Section 3179 of the Revised Statutes. Section 3616(a) stems directly from Section 3179 of the Revised Statutes and the latter Section was derived directly from Section 15 of the Act of June 30, 1864. This is the message of the Congress; no other statutory history is relevant or appropriate.

The significance of this short and simply history is that from the beginning in 1864 to the end in 1939, 3616(a) and its predecessors clearly and always have been applicable to income tax.[2]

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[2] The action of the Congress in enacting the Internal Revenue Code of 1954 confirms and corroborates this conclusion. The Congress stated that Section 7207 of the 1954 Code is the successor to Section 3616(a) of the 1939 Code. 68A Stat. 948. And there is absolutely no doubt that Section 7207 applies to income tax. See

B. We find nothing in the broadly etched presentation of the historical derivation of the tax laws—upon which the Government has pitched its entire case—which disturbs or affects the conclusion that Section 3616(a) applies to income tax. A review of the tax statutes, to the extent that they may bear on the question, need not be as complex as the Government has strained to make it. The relevant history is plainly and simply this:

(a) The Act of 1864, imposing an income tax, provided criminal penalties for filing false or fraudulent returns. The provision in that Act was patterned after, but made slightly more comprehensive than, similar provisions contained in the statutes of 1861 and 1862, both of which also had imposed income taxes. (Brief for the United States, pp. 17-18).

(b) In 1874 Congress enacted, in the Revised Statutes—as permanent legislation—Section 3179, expressly derived from the Act of 1864, establishing a criminal penalty for filing a false or fraudulent return, plainly and admittedly applicable to income tax (Brief for the United States, pp. 18-19).

(c) From 1870, when Congress repealed the Civil War income tax of 1864, until 1894 there were no income tax statutes. Section 3179 of the Revised Statutes, however, continued to remain as part of the permanent laws. (Brief for the United States, pp. 18-19).

Dillon v. *United States* (CA 8, 1955), 218 F. 2d 97, 103; *Cf. Berra* v. *United States*, 351 U. S. 131, 134, footnote 5. Furthermore, Congress made it clear that the applicability of Section 7207 to income tax was not a novel departure. Both House and Senate Committee Reports stated that the new section "contains no material change from existing law." Sen. Rept. No. 1622, H. R. Rept. No. 1337 (83d Cong., 2d Sess.), in U. S. Code Congr. and Adm. News (1954) at pp. 5253, 4573.

(d) The Act of 1894, imposing an income tax, and which was declared unconstitutional by this Court in *Pollock v. Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, contained no criminal provision, but the Government has conceded that Section 3179 of the Revised Statutes was applicable with respect to offenses under this Act. (Brief for the United States, p. 19).

(e) From the Act of 1894 until after the adoption of the Sixteenth Amendment, in 1913, there were no income tax statutes. Section 3179 of the Revised Statutes continued, in the meantime, in the permanent legislation.

(f) The Revenue Act of 1913 contained a criminal provision applicable to income tax. This provision, Section II(F) of the Act, while addressed to filing false or fraudulent returns, provided a maximum fine of $2,000, whereas Section 3179 provided a maximum fine of $1,000. (Brief for the United States, p. 20).

(g) The Revenue Act of 1917, applicable to all forms of taxes, again provided a criminal penalty for false or fraudulent returns, and made the penalty consistent with Section 3179. In addition, the Act applied the penalty to a new and broader offense of evading or attempting to evade any tax, including income tax. (Brief for the United States, pp. 21-22).

(h) The Revenue Act of 1918, and all succeeding acts up to the adoption of the Internal Revenue Code of 1939, contained no express mention of the offense of filing a false or fraudulent return—which continued to be comprehended by Section 3179 of the Revised Statutes. These Acts, however, contained provisions of the broader type which originated in the Act of 1917. (Brief for the United States, p. 22).

(i) In 1939, Congress brought together within the same Code, Section 3179 of the Revised Statutes, designating it as Section 3616(a), and the broader provision appearing in the earlier acts, which it designated as Section 145(b).

(j) In 1954, Congress reenacted both Sections 145(b) [as Section 7202] and 3616(a) [as Section 7207] eliminating from Section 3616(a) the element of "intent to defeat or evade" which caused the overlap with Section 145(b); and placed both sections in Chapter 75, devoted to "Crimes, Other Offenses, and Forfeitures".

This brief recapitulation, we firmly believe, sets forth a reasonably consistent pattern on the part of the Congress to continue in effect and retain an old criminal provision and at the same time to create and perfect a newer and more severe criminal provision which encompassed a broader area. These are the simple, guiding and unembroidered facts. The plethora of other unrelated statutes cited in the Government's Brief add nothing but confusion;[3] and it is this indiscriminate massing of fundamentally irrelevant materials which creates the alleged inconsistencies upon which the Government's argument is grounded.[4]

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[3] E.g. The Act of 1798 "was no federal income tax." Brief for the United States, p. 17, see also p. 14; the War Revenue Act of 1898 "levied no income tax" *Id.* at 19; and the Act of 1909 was not an income tax but "imposed an excise tax on corporations." *Id.* at 20.

[4] Throughout this litigation in the lower courts, in these and other cases, the Government has heretofore relied upon the same facts of legislative history it has now placed before this Court in support of its prior view that Section 3616(a) applied to income tax. See, e. g. Memorandum for the United States in *United States* v. *Berra*, (E.D. Mo.) No. 27866(2); Memorandum for the United States in *Poncet Davis* v. *United States* (N. D. Ohio), Crim. No. 20,632.

C. Throughout this entire history—and the Government does not claim otherwise—no act of Congress ever expressly attenuated, directly repealed, or otherwise in terms cast doubt upon the continuing applicability of Section 3179 of the Revised Statutes to income tax.

Not being able to point to any provision of law which expressly stated that Section 3179 of the Revised Statutes or Section 3616(a) of the Internal Revenue Code of 1939 are not applicable to income tax, the Government is forced to rely upon a purported series of "repeals by implication". In essence, the Government's view is that Section 3179 of the Revised Statutes—though never changed by the Congress and expressly incorporated as Section 3616(a) in the 1939 Code—became suspended in a limbo, on an occasional annual basis, whenever the Congress enacted a revenue law containing a criminal provision applicable to income tax. In the Government's view, the permanent and general statute—admittedly applicable to income tax—retained its force and effect except when Congress in *temporary annual* legislation provided an additional or different penalty for an offense which in terms was broader. The Government's argument requires the striking down of general and permanent legislation, which was ultimately reenacted in identical substance, by resort to the unfavored doctrine of repeal by implication.

Congress' opportunity to repeal expressly was always present, and the repeal of Revised Statutes in the Revenue Acts was a technique known and utilized by the Congress. Congress was aware of the relationship between the temporary revenue acts and the permanent legislation existing in the Revised Statutes.

In more than one revenue act, Congress expressly amended Sections of the Revised Statutes; when it desired. So, in the Revenue Act of 1924, it amended Revised Statutes, Sections 3164, 3165, 3167, 3172 and 3173. See Section 1018, 43 Stat. 344. These Sections, together with Section 3176 had been expressly amended also in the Act of 1918. See Section 1317, 40 Stat. 1146-1148. And Congress acted similarly in the 1916 Act. See Section 16, 39 Stat. 773-775.

Had Congress actually intended to repeal or amend Section 3179, it could easily have accorded that Section the same express and precise treatment which it had given to other Sections of Revised Statutes, which it desired to repeal or amend. To contend—as does the Government (Brief for the United States, pp. 20 *et seq.*)—that Section 3179 was repealed *by implication*, is to assert that Congress meant what it did not say and said what it did not mean.

D. Unable to point to an express repeal of Section 3179 of the Revised Statutes, recognizing that repeals by implication are not favored, cf. *United States* v. *Gilliland*, 312 U. S. 86, 95-6; *Taylor* v. *United States*, (C. A. 9) 179 F. 2d 640, 644; and bound by the Congress' explicit statement that Section 3616(a) is derived from Section 3179,[5] the Government argues that Section 3616(a) took on the meaning which Section 3179 had at the date of the enactment of 3616(a) in 1939; and argues that, by 1939, Section 3179 had become inapplicable to ~~income tax~~. (Brief for the United States, p. 26).[6]

That conclusion, in turn, rests on the assumption that the 1909 Act taxing corporations set the pattern for

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[5] 53 Stat. App., xxxii, Table A.

[6] This is an apparent contradiction of the Government's position stated on page 19 of its Brief.

later penal provisions limited to income tax; and that "Congress no longer relied on the general provision of Section 3179 but legislated specifically in the successive income tax laws as to the penalties for the violations thereof." (Brief for the United States, p. 20). That assumption is not supported by historical fact.

Except for the Revenue Act of 1913[7] which generally carried forward the criminal provisions of the 1909 Act, and except to the limited extent provided in the Revenue Act of 1917,[8] Congress did not legislate specifically with respect to penalties for income tax violations until the Revenue Act of 1928.

In the Revenue Act of 1928, Congress simply duplicated the criminal provisions of the 1924 Act with specific reference to income taxes. Neither the 1928 Revenue Act nor any later Revenue Act contained any specific criminal provision with respect to the other forms of taxes, with the exception of the Revenue Act of 1932 which contained a specific penalty provision covering gift taxes. Accordingly, the criminal provisions of the 1924 and 1926 Acts carried over into these later Acts, along with Section 3179 of the Revised Statutes. All of these were codified in the Internal Revenue Code of 1939. These special criminal provisions of the 1939 Code were drawn from Section 1017(a) and (b) of the 1924 Act, except for Section 3616(a) which, as already stated, derived from Section 3179 of the Revised Statutes. Congress did not actually pass special criminal provisions relative to any of the

[7] Sec. II(F), 38 Stat. 114, 171, known as the Tariff Act of 1913.

[8] Sec. 1004, 40 Stat. 300, 325. Section 253 of the Revenue Act of 1918, 40 Stat. 1057, 1085, removed the discrepancy between Section 3179 of the Revised Statutes and Section II(F) of the 1913 Act, by restoring the fine to $1,000.

miscellaneous taxes. Those provisions were inserted in the 1939 Code by the codifiers.

In consequence, the Government's position is not advanced by its argument that Section 3616(a) took on a limited meaning in 1939; because in 1939, Section 3179 of the Revised Statutes did not have a limited meaning. It applied as much to income taxes in 1939 as it did in all of the years since its inception. The Government's indiscriminate mixing of non-income tax statutes with income tax statutes throughout its historical discussion is misleading, for the reason that, with the exception of two statutes previously mentioned (Revenue Act of 1913 and Revenue Act of 1918), there was no specific legislation relating to income taxes prior to 1928.

E. The meaning which the Government seeks to attribute to Section 3616(a), by comparing it with other statutes in *pari materia* (Brief for the United States, pp. 29, *et seq.*), is also poorly taken. It is predicated on the assumption that the Congress intended to establish a perfectly consistent scheme of sanctions in which each sanction holds a separate and specially chosen niche. Such an assumption, however, flies in the face of the history of the development of the criminal provisions in the revenue laws, *supra*, page 6; and assumes the answer to the question posed by this case. It is because Sections 145(b) and 3616(a) overlap, and do not apply to different conduct, that the problem presented here has arisen. And because the statutory scheme created by the Congress is not neat, it does not follow that it is for the courts to make it so.

The plain and simple answer to the Government's "*pari materia* argument" lies in what the Congress

did in enacting the Internal Revenue Code of 1954. Cognizant at that time of the overlap between Sections 145(b) and 3616(a), and of the fact that the Government was prosecuting income tax evaders under both provisions, the Congress amended Section 3616(a) to remove the language which caused the overlap. By the change so wrought in 1954, Congress at one and the same time eliminated the overlap, and removed from the Executive Branch the power to choose between these two provisions, covering the same ground.

F. As a matter of fact, the excursion into legislative history forced upon us by the Government is really an exercise in irrelevance. Section 3616(a), on its face, plainly applies to income tax. As the Government has noted in its Brief: "The language of the section * * * is general and unqualified, and in terms it appears to embrace every type of federal tax return without exception." (p. 13). This then, "is a case for applying the canon of construction of the wag who said, when the legislative history is doubtful, go to the statute." *Greenwood* v. *United States*, 350 U. S. 366, 374. For this Court has many times held that: "there is no need to refer to the legislative history where the statutory language is clear." *Ex parte Collett*, 337 U. S. 55, 61; *United States* v. *American Trucking Associations*, 310 U. S. 534, 543 and cases therein cited; see also *United States* v. *McKesson and Robbins*, 351 U. S. 305, 315.

II

A. There is, in addition a further important reason why the Government's sudden disavowal should not be permitted to affect the applicability of Section 3616(a) to income tax: this is the well recognized principle

that "Such specific and established administrative interpretation of the statute is valid and 'should not be overruled except for weighty reasons.'" *Commissioner* v. *Sternberger's Estate*, 348 U. S. 187, 199; *Commissioner* v. *South Texas Co.*, 333 U. S. 496, 501; see also *United States* v. *Leslie Salt Co.*, 350 U. S. 383, 396-97, where this Court declined to accept the Government's *ad hoc* contention and adopted instead an undisturbed administrative interpretation. Here, we have a history—not merely of administrative *construction*—but of active and affirmative *prosecution* by the Government of income tax violations under Section 3616(a). If an established administrative construction cements meaning to a statute, a continuing and persistent course of prosecution certainly does.

And there is also another well recognized principle apposite. This is that congressional reenactment in the light of established administrative construction adopts as law the administrative construction. *Wilmette Park District* v. *Campbell*, 338 U. S. 411, 417-18; *White* v. *United States*, 305 U. S. 281, 291; *United States* v. *Leslie Salt Co., supra; cf. Morgan* v. *Commissioner*, 309 U. S. 78, 81. When the Congress, in 1954, aware that the Government had been proceeding under Section 3616(a) in income tax cases, reenacted Section 3616(a) as Section 7207 of the 1954 Code—which, as already indicated, is clearly applicable to income tax—the Congress solidified, if solidification was necessary, the view that Section 3616(a) applied to income tax.[9]

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[9] That Congress, in the 1954 Code, eliminated that portion of Section 3616(a) which caused the overlap with Section 145(b) is further indication of its awareness of the use of Section 3616(a) in income tax prosecutions. The obvious purpose of removing the

B. In view of its unseemly and belated change of attitude with respect to the meaning of Section 3616(a), the Government has been forced to lay before the Court the history of its prosecution of income tax violators under that provision. It has confessed that since October 1, 1952, of a total of 177 cases filed, it has so far obtained a total of 120 convictions for income tax evasion under Section 3616(a). (Brief for the United States, pp. 14-15). Its present position before the Court that Section 3616(a) is inapplicable to income tax is obviously and hopelessly in contradiction with the fact of these prosecutions. In its Memorandum filed in No. 834 on March 22, 1957 it suggested that the convictions obtained under Section 3616(a), if laid under the wrong statute, could be supported under Section 145(b). Memorandum for the United States in No. 834, O.T. 1956, p. 2, fn. 4.[10]

The case of *United States* v *Jones* (S.D. Fla., No. 636, Ocala, Criminal), a 3616(a) income tax prosecution, was instituted, according to the Government, by an information. (Brief for the United States, p. 14). The Government has not indicated how many of the remaining 119 successfully completed income tax cases under 3616(a) were commenced by information; but it is likely that most, if not all, were so instituted. Since a conviction under Section 145(b) is a felony, and under 3616(a), a misdemeanor, the convictions obtained under 3616(a) by information may not—in the absence of a waiver—be sustained under Section

language "with intent to defeat or evade" from Section 7207, was to eliminate the overlap with Section 7202 [formerly Section 145(b)].

[10] The Government's Brief on the Merits does not contain such an assertion, apparently in the hope that it can take the position that Section 3616(a) does not apply to income tax and at the same time not affect the convictions for income tax heretofore obtained under that provision. This is obvious casuistry.

145(b), which requires an indictment. Rule 7(a) F.R. Crim. Proc. In point of fact, all of the 3616(a) income tax convictions, founded on informations, must be nullified under the Government's sudden change of view.

And even without regard to whether these cases were founded on informations, it is important to note that 118 of them were disposed of on pleas of guilty or *nolo contendere*. How many, we must ask, of these income tax defendants would have pleaded guilty or *nolo contendere* if they knew that they were pleading to a felony, rather than to a misdemeanor? The critically different consequences which flow from conviction of a felony are too great to permit the Government's sleight-of-hand *retroactively* to convert pleas to a misdemeanor into convictions for a felony.

C. We feel compelled also to advert briefly to the unseemly argument implicit in footnote 3 at pages 14-15 of the Government's Brief. Here we find a new version of the "numbers game" which has become so popular in recent years. Inherent in this footnote is the suggestion that holding 3616(a) inapplicable to income tax will affect less people than will a holding in support of Petitioner's contentions. Certainly the implications of such an argument need not be pointed out to the Court. This Court has never decided a case on such an irrelevant basis; and we are satisfied that it will not decide this case on such a basis. The issue before the Court is whether, by virtue of the overlap between Sections 3616(a) and 145(b), Petitioner's conviction is vitiated or, at least governed by Section 3616(a). And this issue must, of course, be determined by the language of the statute, by reference to the background of the statute, if such reference is necessary, and by the guiding principles applicable to decision of the question posed. It can-

not be decided "by the numbers". *Cf.* this Court's response to a similar Government argument in *Spies* v. *United States*, 317 U. S. 492, 500.

D. The Government has given the impression that the applicability of Section 3616(a) to income tax was first discovered by it in 1952 when it launched a program of prosecutions for income tax violations under that Section. (Brief for the United States, pp. 13-14). But, of course, the Government must have been aware that Section 3616(a) was applicable to income tax violations many years before that. For it had itself urged this position in at least one case in 1945, *United States* v. *Koppelman*, 61 F. 2d 1007 (M.D. Pa.). And there were many cases which "tacitly sustained" the view that Section 3616(a) was applicable to income tax returns, some prior to *Koppelman*. See *Ex parte Cohen*, 191 F. 2d 300 (C.A. 9), certiorari denied, 342 U. S. 947; *Taylor* v. *United States*, 179 F. 2d 640, 643-644 (C.A. 9); *Kirsch* v. *United States*, 174 F. 2d 595, 597-598 (C.A. 8); *Slick* v. *United States*, 1 F. 2d 897 (C.A. 7); *Ex parte Berkoff*, 65 F. Supp. 976, 979-981 (D. Minn.); *United States* v. *Benz*, 24 Fed. Cas. No. 14,576 (N.D. Ill.) see also 10 *Mertens, Law of Federal Income Taxation*, Sec. 55.66.[11] And see *United States* v. *Smith*, 13 F. 2d 923 (W. D. La.).

Equally misleading is the Government's explanation that "Prior to the Eighth Circuit's decision in *Dillon* v. *United States*, 218 F. 2d 97 (1955) there were no judicial holdings or intimations that Section 3616(a) could not be so applied." (Brief for the United States, p. 16). Among other things, the Government

[11] These cases were cited in the Government's Brief on the Merits in this Court in *Berra* v. *United States*, No. 60, O.T. 1955, at page 24.

itself in 1926, urged that Section 3179 of the Revised Statutes, the precursor of Section 3616(a), did not apply to income tax. See Government's Brief on the Merits in *United States* v. *Noveck*, 273 U. S. 202 (No. 395, O.T. 1926) pp. 16-19.[12]

Moreover, the Eighth Circuit's holding in the *Dillon* case, *supra*, that Section 3616(a) was inapplicable to income tax did not spring unprompted from that Court's imagination. That view had been urged upon the Court in the Government's brief. See *John H. Mitchell, "Current Developments in Fraud Prosecutions"*, New York University Institute on Federal Taxation, 15th Annual Institute (1957, Matthew Bender & Co.), p. 1222.

The Government's views that Section 3616(a) is applicable to income tax appear to parallel its views that Section 3616(a) is inapplicable to income tax. It is no wonder that at the very threshold of the argument of the case at bar, it was not abashed once again to reverse its position. Historically it had been on both sides of the question. Its pattern of change may, perhaps, be best described by paraphrasing the late Justice Jackson's observation in *American Communications Assn.* v. *Douds*, 339 U.S. 382, 422, 427: The Government seems to have been "somersaulting in synchronism" with shifts for the specific strategy suggested by the particular case.

The *Dillon* case is a dramatic illustration of this somersaulting. In that case, we have the spectacle of

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[12] By citing its own Brief on the Merits in the *Noveck* case in this case (Brief for the United States, p. 13), the Government is obviously seeking to climb on its own boot straps. It is interesting to note that the decision of this Court in *United States* v. *Noveck*, 273 U.S. 202 did not accept the Government's contention with respect the inapplicability of R.S. 3179 to income tax.

the Government first arguing that Section 3616(a) is inapplicable to income tax; next, we have the Eighth Circuit adopting this view; then, we have the Government in its response to the petition for certiorari in this Court disavowing the view it urged before the Circuit Court, which the Circuit Court adopted; and now we see the Government reembracing the view it had earlier urged and disavowed. This vacillating conduct was not devoid of consequences. The Eighth Circuit, in *Dillon*, held that Section 3616(a) was inapplicable to income tax; it also noted that Section 3616(a) was succeeded by Section 7207 of the 1954 Code; and it observed that Section 7207 was applicable to income tax. 218 F. 2d at 103. The link which was missing, and which makes the contradiction complete, was the observation of the Congress in enacting Section 7207 of the 1954 Code, that Section 7207 effected no material changes in existing law. See fn. 2, *infra*, pp. 3-4.

III

On the assumption that this Court will hold Section 3616(a) applicable to income tax, and reject the Government's latest contention to the contrary, there still continues to remain the problem which arises from the resulting overlap between that Section and Section 145(b). Petitioner, as well as Amicus Curiae, have discussed at length in their Principal Briefs the reasons why a conviction is nullified or vitiated under such circumstances; or, alternatively, why the less harsh of the two applicable penalties must be imposed. We continue to stand on those arguments. There are, however, certain statements in the Government's Brief which call for reply.

A. In footnote 32, at page 39 of the Government's Brief, the Government makes an argument which in its own words is "without regard to the facts of this

particular case." The Government there suggests that Sections 145(b) and 3616(a) *theoretically* can apply to different situations, and that on this *hypothesis* a violation of one provision would not necessarily constitute a violation of the other. With this we plainly agree. To the extent that there is a violation of Section 145(b) which is not based upon the filing of a false or fraudulent return, there would be no overlap between 145(b) and 3616(a).[13]

But this case is addressed to the situation where there is an overlap between Sections 145(b) and 3616(a). And the Government has plainly conceded that this overlap will occur in "the overwhelming majority of criminal prosecutions relating to income tax," because in that overwhelming majority of cases, the charge is based upon the filing of false or fraudulent returns. (Brief for the United States, pp. 32, 36, see also fn. 3 pp. 14-15). It is with this situation, in which the facts of the instant case fall, that we deal here. And it is in this situation, as the Government has also conceded, that the proof required to make out the offense under Section 145(b) is identical with the proof required to make out the offense under Section 3616(a). (Brief for the United States, p. 33).[14]

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[13] Conversely, there are instances when a violation of Section 3616(a) may not constitute a violation of 145(b)—but, again that is not the case here.

[14] And an indictment under 145(b) which omitted the charge that evasion was by filing a false or fraudulent return (see Brief for the United States, pages 36-37), would not cure this problem. An indictment charging evasion, but without defining the manner of evasion, would—as the Government concedes—be subject to a Bill of Particulars. And when the Particulars indicated that the manner of evasion was by the filing of a false or fraudulent return, the question posed by the instant case would immediately and clearly emerge. For, as has been observed, "an indictment may validly

This admission on the part of the Government is at odds with the statement immediately following to the effect that Section 145(b), under Petitioner's view, would proscribe attempted evasion "in any manner except filing a false or fraudulent return." (Brief for the United States, p. 33). This misconceives the issue completely. It is precisely because both statutes proscribe the filing of a false or fraudulent return and both admittedly require identical proof, that questions concerning the invalidity of the conviction arise.

Likewise, the Government's admission at page 33 of its Brief that the proof in each case of filing a false or fraudulent return is identical, whether under 145(b) or 3616(a), defeats completely its statement at page 36 that "the filing of a false and fraudulent return is not an essential ingredient of the offense" under Section 145(b). That language is taken from *United States* v. *Albanese*, (C. A. 2) 224 F. 2d 879, 882, cert. den. 350 U. S. 845. But in that case, the indictment did not charge the filing of a false or fraudulent return; it charged "attempts" to evade the payment of tax. Accordingly, the charge in that indictment differed from the charge in Petitioner's indictment. See also, *United States* v. *Kafes* (C. A. 3) 214 F. 2d 887, cert. den. 348 U. S. 887; *Beaty* v. *United States* (C. A. 4) 213 F. 2d 712; *United States* v. *Smith* (C. A. 3) 206 F. 2d 905. And, in *Parr* v. *United States*, 351 U. S. 513, the Government admitted that where the indictment went only to the filing of a false or fraudulent return, the proof in such case was "simpler". (Brief for the United States, No. 320, O.T. 1955, at pp. 62, 74).

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satisfy the statute under which the pleader proceeded, but other statutes not referred to by him may draw the sting of criminality from the allegations." *United States* v. *Hutcheson*, 312 U. S. 219, 229.

B. On this phase of the case, the Government has forthrightly set forth its position: "We rely", states the Government, "mainly upon *United States* v. *Gillilland*, 312 U. S. 86; *United States* v. *Beacon Brass Co.*, 344 U. S. 43; and *United States* v. *Moran*, 236 F. 2d 361 * * * ." (Brief for the United States, p. 39).

The Government's authorities can be readily answered. *United States* v. *Beacon Brass Co., supra*, is not apposite insofar as the question posed by this case is concerned. The two statutes before the Court in that case, though overlapping "in a narrow area", called for different proof, a condition not present in the instant case. This Court noted in *Beacon Brass*, that a conviction under the False Statements provision did not require an element of proof which is required under Section 145(b): "That the false statements were made in a willful effort to evade taxes." 344 U. S. at 45. Therefore, it did not necessarily follow that proof of violation of the False Statements provision would be proof of violation of Section 145(b). In this case, however, even the Government has conceded that the proof required to make out the offense under Section 3616(a) is identical to the proof required to make out the offense under Section 145(b). (Brief for the United States, p. 33). And this Court has so held. *Berra* v. *United States*, 351 U. S. 131, 134.

There is nothing in *United States* v. *Moran, supra*, which furthers the Government's position. In the *Moran* case the Second Circuit stated: "This situation is directly controlled by *United States* v. *Beacon Brass Co.*" 236 F. 2d at 363. Since *Beacon Brass*, does not help the Government, *Moran* certainly does not. Moreover, the *Moran* case is no different than any of the other Circuit Court decisions deciding the problem

now before this Court in this case. *Cf.* e.g. *United States* v. *Achilli* (C.A. 7) 234 F. 2d 797; *Hoover* v. *United States* (C.A. 3) 233 F. 2d 870; *Costello* v. *United States* (C.A. 2) 239 F. 2d 177. Relying on the *Moran* case as authority here is the same as citing as authority in this Court the decision from which the appeal is taken.

In *United States* v. *Gilliland*, 312 U. S. 86, the defendant was indicted under Section 35 of the Criminal Code for filing false statements relating to "hot oil" with the Department of the Interior. Upon a demurrer to the indictment defendant contended that Section 35 had been repealed by implication by a provision of the "Hot Oil" Act which specifically comprehended the filing of false statements with respect to the subjects covered by the Act. The District Court sustained the demurrer. On direct appeal to this Court, the District Court's determination was reversed.

This Court's holding was based on the peculiar history of Section 35, which had been amended at the express request of the Secretary of the Interior to cover the conduct in question. The language of the statute was held to be unambiguous, the intention of the Congress plain, and the legislative history clear. No determination was made in *Gilliland* with respect to the validity of a conviction under one or the other of the provisions—which, of course, is the issue before the Court in the case at bar. And, therefore, this Court did not in *Gilliland* face nor determine the issue posed by the instant case.

Moreover, in *Gilliland*, the conduct involved was proscribed by the provisions of two entirely different statutes; that is, the same conduct was within the reach of two different statutory schemes. Here, by

contrast, the provisions involved reside in a single statutory scheme, are part of the same "Code", and are necessarily directly related to each other.

If these significant differences between *Gilliland* and the instant case are not considered to be determinative, then we contend that the force of *Gilliland*, if any there be, was completely dissipated by this Court's holding in *United States* v. *Evans*, 333 U. S. 483.

It is, we suspect, more than accident that the Government has devoted less than one page in its Brief (p. 48) to a treatment of the *Evans* case despite the emphasis placed upon this case in both Petitioner's Main Brief and the Brief of Amicus Curiae. Moreover, the Government's discussion of *Evans* is more in the nature of a description of it than a discussion of its significance and application to the problem before the Court in this case. We continue to contend that the *Evans* case is directly applicable and provides the guidepost for decision of this case on this point.

Certainly the briefs in this case indicate that the question before the Court is a difficult one, and also that it is not an easy matter "to ascertain with any fair degree of assurance which one of the possible penal consequences Congress may have had in mind." *United States* v. *Evans*, 333 U. S. at 485. Indeed, the problem and the inconsistencies posed by the statutory provisions at issue in this case far exceed those posed by the provisions involved in *Evans*. And so, this

Court's conclusion in *Evans*, seems particularly appropriate here:

> "This is a task outside the bounds of judicial interpretation. It is better for Congress, and more in accord with its function, to revise the statute than for us to guess at the revision it would make. That task it can do with precision. We could do no more than make speculation law." 333 U. S. 495.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the main brief, it is respectfully submitted that the sentence imposed upon the Petitioner is illegal and void, and should, therefore, be vacated and set aside; or at the least, that the sentence imposed under Section 145(b) as a felony be corrected as one under Section 3616(a) as a misdemeanor.

Respectfully submitted,

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